COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 00172001**

Sean O'Sullivan	Employee
Certainteed Corp.	Employer
ACE American Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Costigan)

APPEARANCES
Brian C. Cloherty, Esq., for the employee
Joseph S. Buckley, Jr., Esq., for the insurer

CARROLL, J. The insurer appeals from an administrative judge's decision awarding the employee ongoing § 34 temporary total incapacity benefits, making a number of related arguments challenging the judge's subsidiary findings. We find no merit in the insurer's argument that the judge made insufficient findings to support his conclusion that an injury occurred at work, and summarily affirm the decision as to that issue. However, we agree that the judge's subsidiary findings do not support his conclusion that the employee is totally incapacitated since the judge failed to adopt any of the many medical opinions in evidence. We also agree that the judge failed to perform an adequate vocational analysis, and that he mischaracterized, in part, the opinion of the impartial physician. We therefore recommit the case for further findings on incapacity, as well as for an appropriate vocational analysis and reconsideration of the impartial physician's actual testimony.

Sean O'Sullivan emigrated to this country from Ireland in 1991, and is currently a United States citizen. He attended primary and secondary school for ten years, and technical college for one year. He began working for the employer, a shingle manufacturer, on March 9, 1992, mixing the granules necessary for shingle production. He went on to become a "cooler man," inspecting a portion of the production line to ensure that the

product was the correct temperature. After his injury, he became a laminator operator, which required him to monitor the lamination operation and clear any jams, which the employee testified occurred almost daily.

On January 3, 2001, the shingle plant was in a "shutdown period" so that inventory and safety checks could be performed. The employee was assigned, with one or two other employees, to take apart a device called a "spider," which consisted of metal pipes connected to a large holding tank. To accomplish this task, Mr. O'Sullivan and his co-workers lifted lengths of pipe, some weighing 200 pounds, and aligned, sealed and bolted them together. This was not Mr. O'Sullivan's regular job, and he had performed it only once in his career at the shingle factory. (Dec. 4-5.)

Upon completing his shift, Mr. O'Sullivan complained to his "leadman" that he was experiencing pain from his right hip down to his thigh, as well as numbness in his leg. Two days later, he saw his primary care physician, Dr. Douglas Grogan, who prescribed Celebrex and ordered an x-ray. The employee returned to work a week after the injury, and worked until the following Wednesday, by which time he was in extreme pain. In the early morning hours of January 18, he called an ambulance and went to the hospital, where an MRI and x-ray were taken, and he was given pain medication. He attempted to return to work a few weeks later, on February 12, but was able to work for only four hours. He returned to work again on February 26, and was able to work until March 11. He was out of work again for over nine months, from March 11 until December 26, 2001 when he returned to work after the insurer terminated his benefits. He left work on February 9, 2002 due to pain, and has not worked since then. (Dec. 5-6.)

Following a § 10A conference, the administrative judge ordered the insurer to pay the employee several periods of weekly § 34 temporary total incapacity benefits, as well as ongoing § 35 partial incapacity benefits beginning on March 11, 2001. (Dec. 2.) Both parties appealed to a hearing de novo. (Id.; Insurer's brief, 1.) Pursuant to § 11A, Dr. James Broome examined Mr. O'Sullivan on September 18, 2001, and diagnosed him with lumbosacral strain causally connected to his work injury. (Dec. 7). Dr. Broome was

deposed approximately a year after the examination, on September 5, 2002. (Dec. 3.) The judge found that Dr. Broome testified in his deposition that he would have changed his diagnosis from lumbar strain to lumbar radiculopathy if he had seen EMG and nerve conduction tests performed before his examination. (Dec. 7.) He went on to find the impartial opinion inadequate because of "Dr. Broome's admitted inability to give the proper diagnosis. . . and his admissions during deposition." (Dec. 8.)

Additional medical evidence was admitted and discussed by the judge in his decision. (Dec. 6-7.) The judge concluded:

> Every medical professional that has seen Mr. O'Sullivan, including the insurer's independent medical examiner and the impartial physician, has causally related his injury to his work. The medical evidence and testimony offered lead me to find that the employee sustained an injury in the course and scope of his employment on January 3, 2001.

(Dec. 9.) The judge then analyzed the employee's incapacity as follows:

> "[T]he concept of 'incapacity to work' . . . combines two elements: physical injury or harm to the body, a medical element, and a loss of earning capacity traceable to the physical injury." DiRusso v. M.B.T.A., 11 Mass. Workers' Comp. Rep. 217, 219 (1997).

From the medical testimony and various medi[c]al reports I find that the first prong of this test is easily met. I further find that Mr. O'Sullivan made several attempts to return to his job at Certainteed but was unable to . . . continue due to the pain he suffered-a result of his medically diagnosed and work related injury.

Mr. O'Sullivan testified that his job of laminator operator was considered "light duty work." I find this testimony credible on this point. Needless to say, I find further, based on his testimony, that the position as laminator was anything but remotely consistent with light duty work. Indeed, given the demands it merely replicated the job duties of a cooler. Mr. O'Sullivan testified credibly that he could not perform the essential functions of the job, much less any job that requires a minimum of lifting up to 80 pounds, crawling, bending, twisting, pulling, or even sitting.

In February 2002, Mr. O'Sullivan grudgingly ceased from labor due to the excruciating pain associated with his injury. He underwent numerous tests and was found to have been injured. I find that he was, and is currently, temporarily totally disabled as of January 17, 2001, to date and continuing, minus those times when Mr. O'Sullivan valiantly attempted to work.

(Dec. 9-10.) (Emphasis added.) The judge awarded the employee § 34 benefits from January 18, 2001 to February 11, 2001; from February 12, 2001 to February 25, 2001; from March 11, 2001 to December 26, 2001; and from February 9, 2002 to date and continuing. He further instructed the insurer to credit itself with any benefits already paid to the employee.[1] (Dec. 11.)

We agree with the insurer's contention that the judge made inadequate subsidiary findings to support his award of temporary total incapacity benefits. It is axiomatic that "[r]ecitations of testimony without clear subsidiary findings of fact do not enable the reviewing board to determine with reasonable certainty whether correct rules of law have been applied." Saulnier v. New England Window and Door, 17 Mass. Workers' Comp. Rep. 453, 456 n. 3 (2003), citing Messersmith's Case, 340 Mass. 117, 119 (1959), citing Judkins's Case, 315 Mass. 226, 227 (1943). Here, the judge recited the opinions of the physicians whose testimony was presumably admitted,[2] and then concluded, without

[1] The insurer also contends that the judge ordered benefits for a two-week period when the employee actually worked in August 2001 and February 19 and 20, 2002. However, the judge made no subsidiary findings that the employee worked during those times, so we find no error. At any rate, since the case is being recommitted for further findings on extent of incapacity, the judge's award of benefits may have to be revised.

[2] The judge did not list at the beginning of his decision, the additional medical evidence which was admitted, or even indicate that such evidence was admitted. However, he did

adopting any medical opinion, that based on "the medical testimony and various medi[c]al reports," (Dec. 9), the medical element of the incapacity equation had been met. While this approach might pass muster in the rare scenario where all the medical evidence admitted was in accord as to the employee's medical disability, that is not the situation here. In fact, in his discussion of the seven physicians whose testimony was admitted, the judge mentioned the opinions of only three on the extent of the employee's disability. Interestingly, none of those three opined that the employee was totally medically disabled. Dr. Broome, the impartial physician, testified that the employee had "no 'ongoing disability.' " (Dec. 7, citing Broome Dep. 16-17.) Dr. Pick, the insurer's examining physician, "was unable to substantiate Mr. O'Sullivan's symptoms and complaints" and opined that his "ailments were not debilitating." (Dec. 7.) Dr. Grogan, the employee's primary care physician, "prescribed pain medication and rest, occasionally releasing him to light duty (not to lift over 10 pounds)." (Dec. 6.)

[A] conclusion on incapacity at any point in time ordinarily requires expert medical testimony. Allen v. Luciano Refrigeration, 15 Mass. Workers' Comp. Rep. 346 (2000); Cipoletta v. Metropolitan Dist. Comm'n, 12 Mass. Workers' Comp. Rep. 206, 208 (1998). . . . The judge is free to credit the testimony of one medical expert over another, Wright v. Energy Options, 13 Mass. Workers' Comp. Rep. 263, 266 (1999), but we should be able to tell on what medical evidence . . . he based his award. Allen, supra. His general finding on extent of incapacity "must emerge clearly from the matrix of his subsidiary findings." Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993)].

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discuss a number of medicals, other than the impartial opinion, which we assume were admitted. Since the insurer does not allege that the judge failed to discuss any evidence admitted, or that he discussed any medical evidence not admitted, we will assume that the judge's discussion of the medical evidence covers the submissions. On recommittal, the better practice will be to list those medical records actually admitted into evidence. Compare Armstrong v. Trust Ins. Co., 15 Mass. Workers' Comp. Rep. 329, 330 (2001)(" 'This is not simply a case where through harmless error a judge failed to list exhibits but obviously considered the offered medicals as reflected in his recitation of the medical evidence' ", quoting Richard v. Edibles Rest., 8 Mass. Workers' Comp. Rep. 122, 125 (1994)).

Cordi v. American Saw & Mfg. Co., 16 Mass. Workers' Comp. Rep. 39, 46 (2002). On recommittal, the judge must strengthen the matrix of his subsidiary findings so that we can tell on what medical evidence he has based his ultimate finding on incapacity.

The employee correctly argues that partial medical disability and total incapacity for work are not necessarily mutually exclusive, Reynolds v. Kay Bee Toys, 16 Mass. Workers' Comp. Rep. 433, 437-438 (2002). Indeed, we have consistently stated that an employee's testimony regarding pain and symptomatology can bolster an opinion of partial medical disability. Frager v. M.B.T.A., 17 Mass. Workers' Comp. Rep. ___ (November 26, 2003). But crediting such testimony, as did the judge here, does not relieve him of the duty to clearly adopt a medical opinion that the employee has some medical disability. See Taylor v. USF Logistics, Inc., 17 Mass. Workers' Comp. Rep. 183, 186 (2003)("While the determination of incapacity to work involves more than a medical assessment of the employee's physical impairment [citations omitted], that does not mean that the medical component can fall out of the picture entirely").

The insurer also challenges the judge's vocational analysis, arguing that the judge should have made findings regarding the employee's ability to perform not just the laminator's job (which he attempted after his injury), but also jobs which Mark Hovis, the acting plant manager, testified were available to the employee. We agree in part. The judge is charged with determining how the employee's medical limitations, in combination with his age, education, work experience, training and other relevant factors, impact his ability to earn. Scheffler's Case, 419 Mass. 251, 256 (1994); Frennier's Case, 318 Mass. 635, 639 (1945). Section 35D instructs the judge to use the greatest amount of four alternative methods to determine earning capacity: the actual weekly earnings of the employee; the earnings the employee is capable of earnings in the job held at the time of injury, provided the job is made available to him and he is capable of performing it; the earnings the employee is capable of earning in a particular suitable job made available to him and which he is capable of performing; or the earnings the employee is capable of earning. Thompson v. Sturdy Memorial Hosp., 10 Mass. Workers' Comp. Rep. 133, 136 (1996). The judge dealt with only the employee's ability to perform the laminator's job, which he

performed after the injury, and which Mr. Hovis testified was still available. (June 7, 2002 Tr. 112.)[3]

The insurer also argues that the judge was required to address the testimony of Mark Hovis regarding other jobs that were available to the employee. Here, the judge listed Mr. Hovis as a witness, but did not discuss or make findings on his testimony that certain positions were available within the company. The insurer seems to want us to assume that Mr. Hovis had made a job offer to the employee, in which case, the judge would be required to make findings regarding whether the offer is " 'bona fide, within the employee's physical and mental capacity to perform, and bears a reasonable relationship to the employee's work experience, education or training either before or after the employee's injury. G. L. c. 152, § 35D(3) and (5).' " Akoumianakis v. Stadium Auto Body, Inc., 17 Mass. Workers' Comp. Rep. 385, 391(2003) quoting Thompson v. Sturdy Mem. Hosp., supra at 136-137 (1996).

We cannot construe Mr. Hovis' testimony as a job offer, by any stretch of the imagination.[4] However, so that we may be assured that the judge has weighed all the

[3] Even in his discussion of the laminator's position, the judge assumed a lifting requirement (80 pounds) which was greater than that testified to by the employee (50 pounds). (See April 12, 2002 Tr. 88.) On recommittal, the judge should reconsider the employee's ability to perform this position in light of his actual testimony.

[4] At hearing, the following colloquy involving Mr. Hovis ensued:

> The Judge: But I want to identify this, make sure you're not on the record saying that these jobs are jobs for Mr. O'Sullivan so much as these are just jobs that are available.
> The Witness: They are jobs that are available.
> The Judge: Okay. Thank you.
> Q: Let me ask this: Would that job be available to Mr. O'Sullivan?
> A: Which job?
> Q: The laminator job?
> A: The laminator job, it's his current position and it's still open.

testimony, on recommittal, the better practice will be for him to make findings on the employee's ability to perform the positions Mr. Hovis testified were available, once he has adopted a medical opinion or opinions.[5] See Saccone v. Dept. of Pub. Health, 13 Mass. Workers' Comp. Rep. 280, 282-283 (1999)(where witnesses omitted from list at

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(June 7, 2002 Tr. 115.)

Later, Mr. Hovis was asked:

> Q: Are there any other jobs out there for Mr. O'Sullivan?
> A: Can I ask a question? What is qualifying?
> Q: In terms of, that you *could offer* to Mr. O'Sullivan?
> A: Okay. Yes. There are openings currently.
> Q: What other jobs would be open?
> A: We have openings currently, in the shipping department.
> Q: Is there a particular job title?
> A: The "rackman" job title.

(Id. at 119-120.) (Emphasis added.) And finally:

> Q: There was one other position that I believe you mentioned?
> A: Yes.
> Q: What was that position?
> A: The hauler job.
> Q: What does not involve?
> A: It's driving a fork truck . . .
> Q: Is that available on a 40-hour-week basis?
> A: Yes.

(Id. at 122-123.)

[5] Even if Mr. Hovis' testimony could rise to the level of a job offer, it would not have prima facie effect as to Mr. O'Sullivan's ability to earn wages since it does not comport with the requirements of § 35D(3). See Thompson v. Sturdy Memorial Hosp., 11 Mass. Workers' Comp. Rep. 663, 667-668.

beginning of decision, as well as from discussion, judge should identify all witness and make additional findings to clarify degree to which evidence was relied upon); Keefe v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 129, 133-134 (2001)(same).

The insurer also argues that the judge mischaracterized, in part, the opinion of the impartial examiner. We agree. The judge found that Dr. Broome testified that he would have changed his diagnosis from lumbar strain to lumbar radiculopathy had he had EMG and nerve conduction tests available for review.[6] (Dec. 7.) The judge then based his determination of inadequacy on Dr. Broome's "admitted inability to give the proper diagnosis as a result of that information deficit. . . ." (Dec. 8.) However, after reviewing a CT scan done approximately a year later, in March 2002, Dr. Broome testified that it revealed no evidence of nerve root impingement and that he would not expect Mr. O'Sullivan to have radiculopathy. (Dep. 53-54.) Furthermore, the impartial doctor stated that, given the negative myelogram and CT scan, he could not say what was wrong with the employee, nor was he convinced that there was causal relationship to the workplace. (Dep. 57-59.)

Since "the opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying," Perangelo's Case, 277 Mass. 59, 64 (1931), it is this latter opinion calling into question any radiculopathy, rather than his earlier statement that he would have changed his diagnosis to radiculopathy, which must be considered Dr. Broome's evidence.[7] Since additional medical evidence was admitted, the impartial opinion here does not have prima facie effect. Thus, the judge may adopt other opinions over the impartial opinion, or he may adopt the impartial opinion. Silverman v. Dept. of Trans. Assistance, 15 Mass. Workers' Comp. Rep. 176, 179-180 (2001). As discussed above, we cannot tell what opinions the judge has adopted. On recommittal, the

[6] The tests in question were done around March 2001. (Dep. 12-13.)

[7] The insurer does not challenge the judge's finding of inadequacy, which the judge seemed to base, at least in part, on the doctor's statement, early in the deposition, that he would have changed his diagnosis to radiculopathy if he had seen the nerve conduction results.

judge should be sure to consider the final opinion of the impartial doctor when deciding what medical opinion or opinions to adopt.[8]

Accordingly, we vacate the award and recommit the decision for reconsideration and further findings consistent with this opinion. In the interest of justice and fairness, the judge may take further evidence if he deems it necessary.

So ordered.

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

_____
Patricia A. Costigan
Administrative Law Judge

[8] We also note that the judge's statement that "every medical professional that has seen Mr. O'Sullivan, including . . . the impartial physician, has ca[us]ally related his injury to his work," (Dec. 9), is called into question by the impartial examiner's final opinion in his deposition. Since the insurer has not challenged the judge's finding on causal relationship in its brief, however, we do not address the judge's findings on causation.

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